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THE PROCTER & GAMBLE COMPANY  
INTELLECTUAL PROPERTY DIVISION  
WINTON HILL TECHNICAL CENTER - BOX 161  
6110 CENTER HILL AVENUE  
CINCINNATI, OH 45224

EXAMINER

CRAIG, PAULA L

ART UNIT PAPER NUMBER

3761

DATE MAILED: 11/30/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/774,259

Applicant(s)

KLIN ET AL.

Examiner

Paula L. Craig

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 06 February 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9 and 11-21 is/are rejected.
- 7) ☒ Claim(s) 10 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 06 February 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 2/24/04.
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Drawings***

1. The drawings are objected to as failing to comply with 37 CFR 1.84(p)(5) because they do not include the following reference signs mentioned in the description: 47, 126 (page 6, line 5 and page 20, line 28). Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

### ***Specification***

2. The disclosure is objected to because of the following informalities: Figs. 4D, 11A, and 16D do not appear in the Brief Description of the Drawings. Appropriate correction is required.

***Claim Objections***

3. Claim 2 is objected to because of the following informalities: the phrase "with at" is not clearly understood. The Examiner suggests that either "with" or "at" be substituted. Claim 9 is objected to in that a retaining element has already been claimed for the second fastening element (in Claim 5). For Claim 19, it is not clear whether "first surface fastening element" is the same as "first fastening element". Appropriate correction is required.

***Claim Rejections - 35 USC § 102***

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. Claims 5-6, 12-14, and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by European Patent Application EP 0786243 A2 to UniCharm Corporation.

6. For Claim 5, EP '243 teaches an article having a surface fastening system (Fig.

1). The surface fastening system includes a first fastening element (one of the fastening tapes 10, Figs. 1 and 4). The first fastening element has a retaining element (hooks 17, Fig. 4). The first fastening element has an attached portion joined to the article, which is fully or intermittently attached to the article (bonded region 20, Fig. 4). A liftable portion extends from the attached portion (non-bonded region 18, Fig. 4). At least about 5% of the retaining element is located on the liftable portion (Figs. 1-4, col.

3, lines 43-53 and Claim 2). The liftable portion is adapted to be lifted away from the article (Fig. 4). At least one hinge line is positioned between the attached portion and the liftable portion (note the transition line between regions 18 and 20 in Figs. 2 and 4; also see Fig. 1). The surface fastening system has a second fastening element with a retaining element affixed at a second position to the article (the right half of target tape 11, and loops 25, Figs. 1 and 4 and col. 3). At least a portion of the retaining element of the second fastening element is configured to be releasably engageable with at least a portion of the retaining element of the first fastening element on the liftable portion of the first fastening element (Fig. 1 and col. 3, lines 7-10). When the first and second fastening element are engaged and encountering a load substantially in a z-direction the liftable portion lifts away from the article, the z-direction being generally perpendicular to the x- and y- axes (Fig. 4 and col. 4, lines 5-23).

7. For Claim 14, EP '243 teaches an absorbent article having a liquid pervious topsheet, a liquid impervious backsheet joined to the topsheet, and an absorbent core positioned between the topsheet and the backsheet (col. 2, line 58, to col. 3, line 2). EP '243 teaches the article having a first waist region, a crotch region, a second waist region, opposite side panels, a longitudinal centerline, a lateral centerline, a primary direction of load bearing, and a surface fastening system (Fig. 1). The surface fastening system includes two first fastening elements (fastening tapes 10, Figs. 1 and 4). The first fastening element includes an attached portion joined to the article, with the attached portion being fully or intermittently attached to the article (bonded region 20, Fig. 4). A liftable portion extends from the attached portion, the liftable portion being

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adapted to be lifted away from the article (non-bonded region 18, Fig. 4). EP '243 shows a retaining element with at least 5% of the retaining element disposed on the liftable portion (Figs. 1-4, col. 3, lines 43-53 and Claim 2). A hinge line is positioned between the attached portion and the liftable portion (the transition line between regions 18 and 20 in Figs. 2 and 4; also see Fig. 1). EP '243 shows two second fastening elements with retaining elements (the right and left halves of target tape 11, and loops 25, Figs. 1 and 4 and col. 3). The second fastening elements are disposed on the opposite side panels so as to be generally attachable in a face to face relationship with at least a portion of the liftable portion of the first fastening elements when the surface fastening system is in a fastened configuration (Fig. 1). The retaining elements of the second fastening elements are releasably engageable with a portion of the retaining element disposed on the liftable portion of the first fastening elements (Fig. 4). When the first and second fastening element are engaged and encountering a load substantially in a z-direction the liftable portion lifts away from the article, the z-direction being generally perpendicular to the x- and y- axes (Fig. 4 and col. 4, lines 5-23).

8. For Claim 6, EP '243 is silent as to the first fastening element being positioned to the front of the wearer. However, the absorbent article of EP '243 is fully capable of being positioned on a baby with either end toward the front.

9. For Claim 12, EP'243 teaches the absorbent article being a disposable diaper. See Abstract, line 1.

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10. For Claim 13, EP '243 teaches the article including a liquid pervious topsheet, a liquid impervious backsheet, and an absorbent core interposed between the topsheet and the backsheet. See col. 2, line 58, to col. 3, line 2.

11. For Claim 17, EP '243 teaches the first fastening element including a flap with a retaining element. See Fig. 1.

***Claim Rejections - 35 USC § 103***

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

13. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

14. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over European Patent Application EP 0786243 A2 to UniCharm Corporation.

15. For Claim 11, EP '243 teaches all the limitations of Claim 5, as described in paragraph 6 above. EP '243 does not expressly teach the peel load capacity during use being greater than or equal to about 1000 grams. However, peel load capacity is a

result effective variable. The discovery of an optimum value of a result effective variable is ordinarily within the ordinary skill in the art. See *In re Boesch and Slaney*, 205 USPQ 215 (CCPA 1980).

16. Claims 1, 7-8, 15-16, and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over EP '243 in view of U.S. Patent No. 5,897,545 to Kline et al.

17. For Claim 1, EP '243 discloses an article having a surface fastening system and a primary direction of load bearing (Fig. 1). The surface fastening system includes a first fastening element (one of the fastening tapes 10, Fig. 4). The first fastening element has an attached portion joined to the article, which is fully or intermittently attached to the article (bonded region 20, Fig. 4). A liftable portion extends from the attached portion, the liftable portion being adapted to be lifted away from the article (non-bonded region 18, Fig. 4). A hinge line is positioned between the attached portion and the liftable portion (note the transition line between regions 18 and 20 in Figs. 2 and 4; also see Fig. 1). A second fastening element is affixed at a second position to the article (the right half of target tape 11, Fig. 1 and col. 3). The second fastening element is configured to be releasably engageable with at least a portion of the liftable portion of the first fastening element (Fig. 1 and col. 3, lines 7-10). When the first and second fastening element are engaged and encountering a load substantially in a z-direction the liftable portion lifts away from the article, the z-direction being generally perpendicular to the x- and y- axes (Fig. 4 and col. 4, lines 5-23). EP '243 does **not** expressly show the hinge line being disposed at an angle less than 90 degrees relative



to the primary direction of load bearing. Kline '545 teaches an absorbent article having a first fastening element disposed at an angle less than 90 degrees relative to the primary direction of load bearing (first closure member 30, Figs. 1-9D and col. 22, line 48 to col. 23, line 4). The angle is indicated to be advantageous in improving fit and avoiding skin marking (Kline '545, col. 22, line 48 to col. 23, line 4). Placing the fastening member at such an angle would place the hinge line at the same angle. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the article of EP '243 to include an angle less than 90 degrees as taught by Kline '545, to improve fit and avoid skin marking.

18. For Claim 21, EP '243 teaches an article having a surface fastening system and a primary direction of load bearing (Fig. 1). EP '243 teaches the first fastening element including an attached portion, a liftable portion, and a second fastening element as described above for Claim 5 in paragraph 6. EP '243 does **not** expressly teach the article being a pant-like article, nor the first fastening element and the second fastening element being pre-fastened. However, pant-like absorbent articles and pre-fastened fastening elements are well known in the diaper art. Kline '545 confirms this and teaches a pant-like absorbent article with pre-fastened fastening elements (col. 13, lines 11-61, and col. 16, line 61 to col. 17, line 11). This allows additional flexibility in use (col. 16, lines 61-67). It would have been obvious to one of ordinary skill in the art to modify the absorbent article of EP '243 to include a pant-like absorbent article with pre-fastened fastening elements as taught by Kline '545, to provide for additional flexibility in use.

19. For Claims 7 and 15, EP '243 teaches all the limitations of Claims 5 and 14, as described above in paragraphs 6 and 7. EP '243 teaches the article having longitudinal and lateral centerlines (Fig. 1). EP '243 teaches the hinge line intersecting the lateral centerline (Fig. 1). EP'243 does not expressly teach the hinge line intersecting the longitudinal centerline. Kline '545 teaches the hinge line intersecting the longitudinal centerline; see the above discussion of the angle for Claim 1 in paragraph 17. It would have been obvious to modify the article of EP '243 to include the hinge line intersecting the longitudinal centerline, for the same reasons as for the angle for Claim 1 in paragraph 17 above.

20. For Claims 8 and 16, EP '243 teaches the primary direction of load bearing being disposed at an angle less than 90 degrees relative to the hinge line. See the discussion of Claim 1 in paragraph 17 above.

21. Claims 2-4 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over EP '243 in view of Kline '545 as described above, and further in view of U.S. Patent No. 4,699,621 to Stevens et al.

22. For Claim 2, EP '243 and Kline '545 teach all the limitations of Claim 1, as described in paragraph 17 above. EP '243/Kline '545 teach the second fastening element including an attached portion joined to the article (EP '243, Fig. 1). EP '243/Kline '545 teach a hinge line intersected by the primary direction of load bearing with an angle less than 90 degrees (Kline '545, Figs. 1-9D). EP '243/Kline '545 do not expressly teach the second fastening element including a liftable portion extending from

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the attached portion. Stevens teaches a diaper having a second fastening element including a liftable portion extending from the attached portion, and a hinge line positioned between the attached portion and the liftable portion (Figs. 14-26 and col. 9, lines 3-13). Stevens teaches the liftable portion of the first fastening element being configured to be releasably engageable with the liftable portion of the second fastening element (Fig. 26, col. 9, lines 3-13, and col. 11, line 65 to col. 12, line 6). Stevens indicates that this configuration is anatomically form-fitting and self adjusting to provide a good fit and resistance to leakage. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify EP '243/Kline '545 to include the second fastening element having the claimed portions, as taught by Stevens, to provide good fit and resistance to leakage.

23. For Claim 9, EP '243 teaches all the limitations of Claim 5, as described in paragraph 6 above. EP '243 teaches the second fastening element including a retaining element, as described in paragraph 6 above for Claim 5. EP '243 teaches the second fastening element including an attached portion joined to the article (EP '243, Fig. 1). Kline '545 teaches a hinge line intersecting the longitudinal centerline (Kline '545, Figs. 1-9D). EP '243/Kline '545 do not expressly teach the second fastening element including a liftable portion extending from the attached portion. Stevens teaches a diaper having a second fastening element including a liftable portion extending from the attached portion, and a hinge line positioned between the attached portion and the liftable portion (Figs. 14-26 and col. 9, lines 3-13). Stevens indicates that this configuration is anatomically form-fitting and self adjusting to provide a good fit and

resistance to leakage. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the articles of EP '243/Kline '545 to include the second fastening element having the claimed elements, for the same reasons as stated above in paragraph 22 for Claim 2.

24. For Claims 3 and 4, EP '243/Kline '545 do not expressly teach the peel load capacity being greater than or equal to about 1000 grams. However, peel load capacity is a result effective variable, as described above for Claim 11 in paragraph 15.

25. Claims 18-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over EP '243 in view of U.S. Patent No. 5,151,092 to Buell et al.

26. For Claims 18-19, EP '243 teaches all the limitations of Claim 14, as described above in paragraph 7. EP '243 does **not** expressly teach the first fastening element including a masking element or a stiffening element. Buell teaches a first fastening element having a masking element (Fig. 1 designs on landing zone), and a stiffening element (reinforcing strip 116, col. 26, lines 51-55). Buell teaches that the article provides dynamic fit and improved containment (col. 1, lines 10-15). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the article of EP '243 to include a masking element or a stiffening element, as taught by Buell, to provide dynamic fit and improved containment.

27. Claim 20 is rejected under 35 U.S.C. 103(a) as being unpatentable over EP '243 in view of U.S. Patent No. 4,090,516 to Schaar.

28. For Claim 20, EP '243 teaches all the limitations of Claim 14, as described above in paragraph 7. EP '243 does not teach the liftable portion including an elastomeric portion. However, elastomeric fasteners are well known in the diaper art. Schaar confirms this and teaches a liftable portion including an elastomeric portion (elastic strip 112, Fig. 17, col. 5, line 42 to col. 6, line 16). The diaper of Schaar provides a snug fit and is inexpensive to manufacture (col. 1, lines 26-39). It would have been obvious to one of ordinary skill in the art to modify the article of EP '243 to include the liftable portion having an elastomeric portion, as taught by Schaar, to provide a snug fit.

#### ***Allowable Subject Matter***

29. Claim 10 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. The closest prior art is considered to be EP '243, Kline '545, and Stevens. The references do not expressly show at least 5% of the second fastening element retaining element being located upon the **second** fastening element liftable portion, and also fail to provide motivation for combining this feature with the limitations of Claims 1 and 9. The criticality of this limitation is indicated in Applicant's specification, page 9, line 30 to page 10, line 8.

#### ***Double Patenting***

30. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory

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obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

31. Claims 1-20 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 of U.S. Patent No. 6,755,809 to Kline. Although the conflicting claims are not identical, they are not patentably distinct from each other. For Claims 1-20 in the present application, the issued claims include all the elements of these claims other than the liftable portion lifting away from the article when the first and second fastening element are engaged and encounter a load in the Z-direction. This limitation is considered by the Examiner to be functional language of little patentable weight in an apparatus claim. It has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (Bd. Pat. App. & Inter. 1987), and *In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA 1967).

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32. Claim 21 is rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 of U.S. Patent No. 6,755,809 to Kline in view of Kline '545. For Claim 21 in the present application, the issued claims include all of its elements except for the first and second fastening element being pre-fastened. It would have been obvious to include this feature, for the same reasons as described for Claim 21 in paragraph 18 above.

### ***Conclusion***

33. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. U.S. Patent No. 5,286,112 to Bible shows fasteners with attached portions and liftable portions. The remaining prior art references listed on the accompanying Form PTO-892 show the general state of the art.

34. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Paula L. Craig whose telephone number is (571)272-5964. The examiner can normally be reached on 8:30AM-5:00PM M-F.

35. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tanya Zalukaeva can be reached on (571)272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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36. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Paula L Craig  
Examiner  
Art Unit 3761

PLC

TATYANA ZALUKAEVA  
SUPERVISORY PRIMARY EXAMINER

